

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
MARION LOMAX-SCOTT	)	OEA Matter No. 1601-0017-07
Employee	)	
	)	Date of Issuance: June 23, 2009
	)	
	)	
D.C. PUBLIC SCHOOLS	)	
Agency	)	
	)	

OPINION AND ORDER

ON

PETITION FOR REVIEW

Marion Lomax-Scott ("Employee") worked as a Business Manager with the D.C. Public Schools ("Agency"). On November 9, 2006, Employee received a letter from Agency stating that she would be separated from service effective December 8, 2006. The letter informed Employee that her services as a Business Manager at J.O. Wilson and Young Elementary School were no longer needed based on the staff needs of the school

system. Employee's notice stated that her separation was not the result of any adverse action.<sup>1</sup> The notice also stated that Employee could appeal the decision to this Office.<sup>2</sup>

On November 17, 2006, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). Employee requested to be reinstated to her former position as Business Manager. Employee argued that she was wrongfully terminated because there were other business managers with less tenure that were transferred to other schools and not fired.

In response to Employee's Petition for Appeal, Agency argued that Employee was properly separated from service because the staffing needs at the schools where Employee worked were adjusted based on student enrollment, a process referred to as "reconciliation."<sup>3</sup> Agency stated that the schools' budget reconciliation for 2006-2007 was performed in accordance with the DC Board of Education's Resolution R07-04.<sup>4</sup>

In an Initial Decision issued on March 13, 2007, the Administrative Judge reversed Agency's decision to terminate Employee. The issue to be decided was whether Agency's notice informing Employee that she was being "separated from service" constituted an improper termination of employment. The AJ held that the language in the notice could be considered either a reduction-in-force ("RIF") notice or a proposed removal.<sup>5</sup> After evaluating Agency's actions, the AJ determined that if Employee's termination was a RIF, then there was no evidence in the record to show that Agency followed the appropriate RIF procedures.<sup>6</sup> Similarly, the AJ stated that if Agency's

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<sup>1</sup> Notice of Termination Letter (December 9, 2006); *Employee's Petition for Appeal*.

<sup>2</sup> *Id.*

<sup>3</sup> *Agency's Response to Employee's Petition for Appeal*, p. 2 (January 22, 2007).

<sup>4</sup> *Id.*

<sup>5</sup> *Initial Decision*, p. 3 (March 13, 2007).

<sup>6</sup> *Id.* The RIF required Agency to place Employee in her proper competitive level and evaluating her prior to termination.

actions constituted a removal, then the notice should have contained a “statement of ‘cause’ for the action, and a paragraph explaining how Employee could respond to the action and/or appeal it.”<sup>7</sup> The AJ concluded that Agency was unable to lawfully legitimize Employee’s termination by simply characterizing it as a “reconciliation” and ordered Agency to reinstate Employee to her position.

Agency then filed a Petition for Review on April 18, 2007. Agency asks us to reverse the Initial Decision because 1) the decision was based on an erroneous interpretation of statute, regulation or policy, and 2) the AJ’s findings were not based on substantial evidence. Specifically, Agency contends that this case should not be determined at this time without adducing the testimony of its witnesses, Noah Wepman, Deputy Director of Resource Allocations and Valerie Sheppard, Director of Staffing and Employment Services.<sup>8</sup> Moreover, Agency argues that Employee failed to provide substantial evidence to support a finding that her termination was improper.

Under the D.C. Government Comprehensive Merit Personnel Act, District of Columbia government employees may appeal a final agency decision affecting: 1) an adverse action for cause that results in removal, reduction in grade or suspension for ten (10) days or more; or 2) a reduction in force.<sup>9</sup> In this case, Employee’s termination notice stated that she was being “separated from service” effective one month later. The notice also informed Employee of her right to appeal Agency’s actions to this Office. It appears to us that the language in the notice coupled with the reason Agency gave for terminating Employee are consistent with a RIF. Therefore, Agency is required to evaluate Employee and place her in a proper competitive level before terminating her

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<sup>7</sup> *Id.*

<sup>8</sup> *Agency’s Petition for Review*, p. 1 (April 18, 2007).

<sup>9</sup> D.C. Official Code § 1.606.03 (2001).

employment.<sup>10</sup> Furthermore, section 2401.1 of the D.C. Personnel Manual requires that agencies follow these regulations when an employee's release is the result of a lack of work, shortage of funds, reorganization, or the exercise of restoration rights.

If Agency terminated Employee for budgetary reasons, then its actions constituted a reduction in force and required Agency to follow the procedures stated above. Because Agency did not follow the proper procedures, Agency improperly RIF'd Employee.<sup>11</sup>

Although this Board could deny Agency's Petition for Review for the reasons mentioned above, it should be noted that Agency failed to file a timely Petition for Review. OEA Rule 634.2 states that "[a]ny party to the proceeding may serve and file a petition for review of an initial decision with the Board within thirty five (35) calendar days of issuance of the initial decision."<sup>12</sup> The initial decision becomes a final decision of this Office unless a Petition for Review is filed in a timely manner.

The *Notice of Appeal Rights* was included with the March 13, 2007 Initial Decision and served on each party via regular mail.<sup>13</sup> Agency did not file a Petition for Review until April 18, 2007, one day after the thirty five day period expired. Based on the aforementioned reasons, this Board must deny the petition and uphold the Initial Decision.

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<sup>10</sup> 24 D.C.P.M. §§ 2409, 2410 ( 2001).

<sup>11</sup> There was no evidence in the record to suggest Employee was removed from her position. Removal would have required a statement of "cause" for termination.

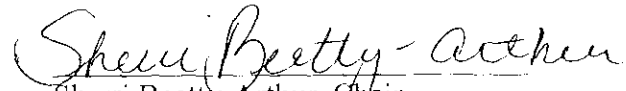
<sup>12</sup> The thirty five day period includes holidays and weekends.


<sup>13</sup> *Initial Decision* (March 13, 2007) p.6.

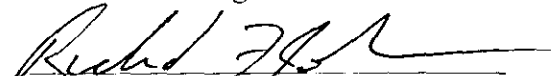
**ORDER**

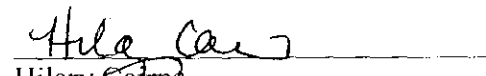
Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**.

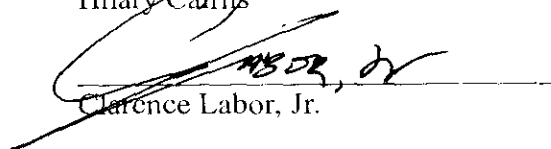
FOR THE BOARD:

  
Sherri Beatty-Arthur, Chair

  
Barbara D. Morgan

  
Richard F. Johns

  
Hilary Cairns

  
Clarence Labor, Jr.

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after the formal notice of the decision or order sought to be reviewed.